IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RECEIVED
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SUPREME COURT, U.S.

No. 80-2209

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT ROSS, JR.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Albert Ross, Jr., by and through his counsel, moves the Court for leave to proceed in forma pauperis in this Court, and as reasons therefore, states:

That said Respondent was granted leave to proceed on appeal in forma pauperis in the United States Court of Appeals for the District of Columbia Circuit, in this case, and that counsel was appointed for Respondent as evidenced by the Order of the Circuit Court which is attached hereto and prayed to be considered as a part hereof.

WILLIAM J. GARBER
306 Sixth Street, N.W.
Washington, D.C. 20001
(202) 638-4667

Counsel for Respondent

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1624 September Term, 19 78

United States of America CR No. 78-698

v.

Albert Ross, Jr.,
Appellant

United States Court of Appeals
for the District of Columbia Circuit
FILED JUN 25 1979
GEORGE A. FISHER
CLERK

BEFORE: Wright, Chief Judge

O R D E R

It appearing that appellant has been granted leave by the District Court to proceed herein in forma pauperis, it is

ORDERED that: William Garber, Esquire (TRC)
406 5th Street, NW
Washington, D.C. 20001
PHONE: 638-4667

a member of the Bar of this Court is appointed to represent appellant in this case.

Appellant's time for filing his brief is extended for a period of 40 days from the date of this order.

In the event counsel files a motion in this Court to extend time for filing appellant's brief and said motion is based in whole or in part upon the fact that counsel is awaiting preparation of reporter's transcript, he shall include in his motion a statement indicating the date when the transcript was ordered prepared; the name of the court reporter(s); the reason why the court reporter has not completed the transcript; and the date by which the court reporter expects to complete the transcript.

For The Court:

GEORGE A. FISHER, Clerk

By: Daniel M. Cathey
First Deputy Clerk

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MEMORANDUM FOR ALBERT ROSS, JR., RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Washington, D.C.
(202) 638-4667

Counsel for Respondent

IN THE
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UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT ROSS, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR ALBERT ROSS, JR., RESPONDENT
IN OPPOSITION

Petitioner contends that a warrantless search, based upon probable cause, of a closed but unsealed paper bag, found in the trunk of respondent's automobile, was permissible under the Fourth Amendment.

The facts in the case were set forth in the two opinions of the Court of Appeals. (Pet. App. 4a-6a; 121a-122a).

On November 27, 1978, Detective Charles Marcum of the Metropolitan Police Department, Washington, D.C. received a telephone call from an informant, whom the Court found to have been reliable in the past, that an individual known as "Bandit" was selling narcotics in front of a certain address in Northwest Washington, D.C. A description was given of "Bandit" and the vehicle and that the drugs were in the trunk of the vehicle.

Detective Marcum along with two other Detectives, went to the area, saw the vehicle at the location, but parked and unoccupied. After passing through the area twice, the police saw the vehicle being driven by respondent. Respondent was stopped, asked to exit the vehicle. A round of ammunition was

found on the front seat. A search of the interior of the vehicle revealed a gun in the glove compartment. Respondent was arrested and handcuffed. The trunk of his vehicle was unlocked by a Detective Cassidy and found inside was a red leather pouch and a closed but unsealed "lunch type bag." Cassidy opened the bag at the scene and observed glassine envelops containing a white powder. The bag was left in the trunk and the vehicle was driven to police headquarters where the paper bag was seized, along with the red leather pouch. The paper bag contained some thirty glassine envelops of powder, which laboratory analysis later proved to be heroin. The pouch contained some $3,200.00 in U.S. Currency.

Respondent was indicted by a federal Grand Jury on certain charges including possession with intent to distribute a contolled substance (21 USC 841a). A motion to suppress evidence was made and denied after hearing by the District Judge. Respondent was convicted of the possession with intent to distribute charge. On appeal, the original panel reversed the conviction, holding that the search of the leather pouch without a warrant, violated respondent's Fourth Amendment rights. A majority of the panel ruled that the warrantless search involving the paper bag did not violate Fourth Amendment rights.

Acting upon respondent's suggestion, the en banc Court, held that the search of the paper bag without a warrant, also violated Fourth Amendment rights. This was the view of seven members of the en banc panel.

The United States of America has petitioned this Court for a Writ of Certiorari challenging the correctness of the Circuit Court's ruling on the search of the paper bag. The United States does not raise the issue concerning the leather pouch as respondent views their petition.

ARGUMENT

Respondent contends that the opinion by the seven member majority of the en banc panel of the Circuit Court correctly applied the law as to the search of the paper bag.

Following the filing of the Petition by the United States, this Court issued its opinions in Robbins v. California, No. 80-148, July 1, 1981 and New York v. Belton, No. 80-328, also decided July 1, 1981. Reference is made to the Robbins plurality.

The plurality opinion reaffirms the principle that the Fourth Amendment "protects people and their effects, and it protects those effects whether they are 'personal' or impersonal.'"

Following the opinion in Robbins, supra respondent contends that the placing of a closed paper bag in the locked trunk of a vehicle "manifested an expectation that the contents would remain free from public examination." citing United States v. Chadwick, 433 U.S. 1, 11.

Under the facts of the instant case, the respondent was in custody following the discovery of a gun in the glove compartment of the vehicle. The trunk of the vehicle was locked and was opened by one of the arresting officers. The paper bag was closed and there appeared to be nothing about the outward appearance of the bag to reveal the nature of its contents. (Pet. A. 25a-26a). The officer only looked into the paper bag, but did not examine the contents of the pouch at the scene of the arrest. Neither item was removed from the trunk and it was not until the vehicle had been taken to police headquarters were both the paper bag and pouch seized from the trunk and the contents searched.

Respondent submits that the Circuit Court, en banc, carefully considered the entire record in this case and concluded that under the facts of this case, the search of the paper bag violated respondent's Fourth Amendment rights. Respondent submits that the en banc majority not only correctly interpreted

Arkansas v. Sanders, 442 U.S. 753 and United States v. Chadwick, supra, but that its opinion adheres to this Court's subsequent opinion in Robbins, supra, and, in fact, the plurality opinion makes reference to United States v. Ross, F.2d ; when it comments. "What one person may put into a suitcase, another may put into a paper bag."

The fact common to Chadwick, Sanders and Robbins, was that each of the containers did not by the appearance of each reveal the nature of its contents and each indicated that the owner manifested an expectation of privacy. The instant case is an example of items contained in a closed opaque container in a location where an expectation of privacy was manifested.

Respondent submits that this Court in its decisions in Chadwick, Sanders and Robbins, has given sufficient guidelines to the lower Courts in the areas of searches and seizures of closed containers found within automobiles. This Court in New York v. Belton, supra has differentiated between searches in the passenger compartment of a vehicle of an arrested occupant and searches conducted under the Chadwick-Sanders rationale. Although the decision in the instant case post-dated Chadwick and Sanders, but pre-dated Robbins, its decision comports with each of the three decisions.

Each case in the area of the Fourth Amendment must be determined ultimately upon its own facts. Respondent submits that the Circuit Courts now have sufficient guidance from this Court in the area in question without this Court being burdened with deciding whether various containers located in the trunk areas of vehicles were properly searched without a warrant on a case by case basis.

Respondent contends that the instant case was properly decided and that it matters not whether the paper bag was merely closed as opposed to being taped shut.

Respondent contends that the Circuit Court's en banc majority opinion correctly concluded that Sanders, supra "did not establish a ' worthy container' rule" (Pet. App. 3a). Moreover, respondent contends that the Circuit Court's en banc majority correctly observed ". . .that a rule under which the validity of a warrantless search would turn on judgments about the durability of a container would impose an unreasonable and unmanageable burden on police and courts. . ." (Pet. A. 4a).

The Circuit Court's en banc majority correctly recognized this Court's stress on 'the centrality of the warrant requirement to Fourth Amendment enforcement.' (Pet. A. 25a). It also recognized the distinction between containers which indicated the nature of their contents and the 'plain view' doctrine and containers which are opaque and which do not reveal what is contained inside. (Pet. A. 25a).

The Circuit Court's en banc majority correctly concluded that ". . .'(w)here-as in the present case- the police without endangering themselves or risking loss of the evidence,' lawfully have stopped a car, detained any person in it suspected of criminal activity, and secured parcels found in the car, they must delay search of the parcels 'until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected.' Sanders, 442 U.S. at 766." (Pet. A. 27a).

Respondent contends that the above quotations from the Circiut Court's en banc majority opinion are entirely consistent with the rationale of the plurality opinion in Robbins, supra, in this connection.

Respondent is fully cognizant of Mr. Justice Powell's concern in what he characterized as a "new 'bright line' rule." However, he concurred in the judgment because of the manner in which the package in question was wrapped and sealed. He further recognized that the central purpose of the Fourth Amendment was "to safeguard reasonable expectations of privacy."

Respondent contends that it is not without significance that the paper bag in question was closed and stored in the locked trunk of the vehicle as opposed to another area of the vehicle more accessible to the public eye and intrusion.

Respondent submits that there is a greater expectation of privacy in the trunk of an automobile than in the interior of the car. United States v. Wilson, 636 F.2d 1161 (10, 1980).

We think that this distinction is implicit in this Court's decision in New York v. Belton, supra.

CONCLUSION

Respondent submits that in view of the exhaustive and careful treatment that this case was given by the Circuit Court's en banc majority and its judicious adherence to the Chadwick-Sanders rationale and the fact that this Court has given greater clarification of the issue in Robbins v. California, supra, the Petition of the United States of America for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. GARBER
306 Sixth Street, N.W.
Washington, D.C. 20001
(202) 638-4667

Counsel for Respondent